93-371

No. _____

Supreme Court, U.S.
FILED
SEP 30 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

Ronnie Dean Barnes,

Petitioner,

v.

State of North Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to the authority of Rule 15, and in the manner provided by Rules 24 and 33 of the Rules of the Supreme Court, the State of North Carolina responds to the Petition for Writ of Certiorari of Ronnie Dean Barnes and requests that this Court deny the relief sought by Petitioner on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

STATEMENT OF THE CASE

Petitioner was charged with first-degree murder, first-degree burglary and attempted arson in three separate indictments returned on 7 August 1989. The charges arose from the late night murder of Bobby Douglas Winn, Jr. at the residence of his father on 26 December 1988. The Petitioner's charges were joined with those of his codefendant, Charles Lee Lemons, and the two were tried at the 12 February 1990 Criminal Session of Superior Court, Forsyth County, North Carolina. On 21 February 1990, the jury returned guilty verdicts on each of the Petitioner's charges and following a sentencing hearing pursuant to N.C.Gen.Stat. §15A-2000, the Petitioner was sentenced to life in prison on the capital charge. Consecutive sentences of 40 and 10 years were imposed for the burglary and attempted arson convictions.

The Respondent's evidence at Petitioner's trial tended to show that between approximately 11:00 p.m. and midnight on 26 December 1988, the twenty-six year old victim was murdered at the home of his father, Bobby Douglas Winn, Sr. ("Mr. Winn"). At that time, the Winn residence was located in Winston-Salem, North Carolina, and was used by Mr. Winn as his dwelling house. Mr. Winn operated a dry wall business out of his home and the victim worked at a job for the business during the day of the murder. After work, the victim apparently went to Bobby Sue's Lounge, a business also owned by Mr. Winn and his wife, arriving there shortly after 4:30 p.m.

Shortly before 6:30 p.m., Mr. Winn left his house and traveled directly to Bobby Sue's Lounge. At that time, the front door of the residence was locked. Mr. Winn maintained an office in his home. A safe was kept in the office underneath a counter and was mounted on rails bolted to the floor. Like his front door,

when Mr. Winn left for the lounge, the door to the office was locked and the safe was in its proper place.

When Mr. Winn pulled into the parking lot of the lounge around 6:30 p.m., he saw his son talking with the Petitioner. Approximately one (1) year earlier, the victim and Petitioner had gotten into a fist fight. The fight resulted in Petitioner being barred from Bobby Sue's Lounge for a period of time.

Between 8:30 and 9:00 p.m., the younger Winn left the lounge to go home because he had to work the next day. When he left, both Petitioner and Lemons were still at the lounge. Approximately thirty minutes later, however, Petitioner and Lemons left together.

Around 10:00 p.m. that night, Carolyn Davis came into the lounge and told Mr. Winn that two tires on his truck were flat. Mr. Winn went out to inspect his 1989 Silverado pick-up and observed that the two tires on the side away from the lounge were flat. He then sent James Overby to the Winn residence to get an air compressor to inflate the tires. Overby went to Mr. Winn's residence and observed the victim's truck parked in the driveway. He knocked on the door but could not get anyone to answer. Overby then went around to Mr. Winn's workshop, got the air compressor out, loaded it in his van and relocked the workshop. At that time, the workshop door was not damaged.

When Overby returned to the lounge, he discovered the tires were punctured and would not inflate. While pumping the tires in the presence of Mr. Winn, Overby observed Petitioner and Lemons drive up in a black compact car with Lemons at the wheel. The car, a black four door Plymouth Horizon, had a confederate or rebel flag on the front.

Mr. Winn then went inside the lounge to get Eddie Brewer to drive him to the Winn residence to get some spare tires. It was between 10:30 and 11:00 p.m. when Mr. Winn and Brewer left for the residence which was only about three miles away. As they pulled out of the lounge parking lot, Overby observed the Petitioner and Lemons following Brewer and Winn in the Plymouth Horizon with Lemons driving.

At the residence, Mr. Winn and Brewer observed the victim's truck in the driveway. One tire was retrieved from the basement and another was removed from the victim's truck. The two then returned to the lounge their trip having taken approximately thirty minutes.

Kenneth Lee Willard testified that he was working at the Parkway Texaco on 26 December 1988 and saw Petitioner at the station between 9:30 and 10:00 p.m. The Petitioner wanted some gasoline and Willard sold him some in a container similar to Respondent's exhibit 5. The Petitioner gave Willard a $20 deposit as security for the container, however, to Willard's knowledge, Petitioner never returned the container.

Brenda Kay Baker testified that on 26 December 1988 she was living with her mother in Winston-Salem. Around 11:00 p.m., Baker was walking back to her mother's house with her sister returning from a store in the area. Near the Winn residence she saw a small black car with a confederate flag on the front parked next to the curb. Two white males she identified as Petitioner and Lemons got out of the car as she walked past. One of them had a container in hand identified by Baker as similar to Respondent's exhibit 5. One of the two yelled to her as she walked by. She turned around and looked but kept walking. When she turned around, she saw them crossing the street and walking in the direction of the Winn residence. The next day,

after hearing about the murder at the Winn residence, she called the police department and later reported what she had seen.

Around 12:15 a.m. on the morning of 27 December 1988, Mr. Winn and his wife left Bobby Sue's Lounge. Upon entering his driveway, he first noticed that the door on his workshop was open and he went over to close it. When he got to the workshop, he found the lock and door to the shop damaged.

Mr. Winn and his wife entered the house through the back kitchen door off the deck. He immediately noticed the hall light was on and the odor of gasoline "about knocked him down." The hall light was not on when he was by earlier to get the tires. In the den, Respondent's exhibit 5 was found on the floor. The door to the office and the front door of the residence were heavily damaged. Both doors had dead bolt locks and the frames of both were shattered in the area where the locking mechanism meets the frame. On the stairway leading to the second floor of the residence, Mr. Winn found his son face down between the first and second landings. There were several bullet holes in the walls around the victim. Later, after inspecting his office, Mr. Winn discovered that approximately seventeen guns were missing and his safe was in the front yard.

A sample of the wet den carpet was removed and sent to the State Bureau of Investigation ("SBI") Lab along with the container. Both were found to contain residual gasoline. A match which had been struck was found on the floor between the living room and the hallway.

On 4 January 1989, Detective Bishop of the Winston-Salem Police Department obtained a search warrant for a Plymouth Horizon registered to Pamela Alderson and her former boyfriend, Robert Wilkes. This was the same vehicle Petitioner and Lemons

were driving the night of the victim's murder. Lemons was living with Alderson at the time of the murder. SBI agent Jed Taub processed the car for the presence of blood using phenolphtalein and luminol. He got positive reactions for the presence of blood on the headlight switch knob, the handbrake lever and the front passenger seat of the car.

SBI Agent Lucy Milkes did an analysis of the blood found in the car and blood found on the safe handle in the house. She compared her findings with blood from jeans the victim was wearing and known blood samples of Petitioner, Lemons and Alderson. The blood on the victim's jeans and the blood found on the car seat were all ABO Type O. Moreover, all these samples were AK type 1 and ADA type 2-1 on the two enzyme tests the agent was able to perform. Agent Milkes testified that approximately 4% of North Carolina's population would have these blood grouping combinations.

The blood on the safe handle was consistent with that of the Petitioner. Forty-one percent of North Carolina's population would have blood grouping combinations consistent with the blood found on the safe handle.

Dr. James McCool performed an autopsy on the body of the victim. A single gunshot wound was observed on the victim's left arm. The projectile had proceeded through the arm into the victim's chest. Additionally, twenty-three (23) stab wounds were found on the body. In the opinion of Dr. McCool, the gunshot would not have caused immediate death. Based on the large volume of blood along the gunshot would tract and the relatively small amount of bleeding around the tissue of the stab wounds, Dr. McCool opined that the gunshot wound was inflicted first.

While neither Petitioner nor Lemons took the stand, both presented evidence through other witnesses in the form of an alibi.

REASONS WHY WRIT SHOULD NOT ISSUE

THE TRIAL COURT CORRECTLY CONCLUDED PETITIONER LACKED STANDING TO CONTEST THE SEARCH AND THE NORTH CAROLINA SUPREME COURT CORRECTLY CONCLUDED THE NO KNOWING AND INTENTIONAL FALSE STATEMENTS, NOR ONES MADE IN RECKLESS DISREGARD FOR THE TRUTH, WERE INCLUDED IN THE APPLICATION FOR THE SEARCH WARRANT.

Prior to trial, Petitioner filed a motion to suppress any evidence, and the results of tests performed thereon, seized during a search of a 1987 Plymouth Horizon pursuant to a search warrant. The Horizon was the vehicle Petitioner and Lemons were traveling in the night of the murder. Pertinent to this PETITION, the motion to suppress alleged the affiant included information in his warrant application which he either knew to be false or which he included in reckless disregard for the truth. After a hearing on Petitioner's motion, the trial court found (1) Petitioner lacked standing to contest the search and (2) that Petitioner had failed to make a sufficient showing that any of the statements were knowingly false or made in reckless disregard for the truth.

The North Carolina Supreme Court noted, without deciding the question, that it would be "hard to say [Petitioner] had an expectation of privacy in [the vehicle]." The court noted the

dearth of evidence to support Lemons' standing and then found "[Petitioner] had even less interest in the vehicle." *See*, PETITION Appendix at 35. Instead of resolving the standing issue, however, the North Carolina Supreme Court elected to decide the search question based on Petitioner's allegation that false statements were included in the affidavit. The court ultimately found the Petitioner had failed to show the allegations in the affidavit rose to the level of a deliberate falsehood or reckless disregard of the truth.

The Respondent contends the PETITION should be denied because (1) the trial court correctly found Petitioner did not have a reasonable expectation of privacy in the vehicle and (2) the North Carolina Supreme Court correctly found the allegations in the affidavit did not rise to the level of a deliberate falsehood or reckless disregard of the truth. The Respondent will address each of these contentions in turn.

A. PETITIONER DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE VEHICLE SEARCHED.

In order to claim the protection of the Fourth Amendment with respect to a governmental search, the person claiming the protection must have a legally sufficient interest in the place searched. The person must have a reasonable expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978). Legitimate expectations of privacy are determined by references to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Id*. 439 U.S. at 143. The ultimate question, therefore, is whether one's claim to privacy from governmental intrusion is

reasonable in light of all the surrounding circumstances. *Id.* 439 U.S. at 152.

Turning to the facts developed below, it is apparent Petitioner had no reasonable expectation of privacy in the automobile searched. Pam Alderson, the live-in girlfriend of Petitioner's codefendant, Charles Lee Lemons, owned the vehicle jointly with Robert Wilkes, Alderson's former boyfriend. Wilkes had refused to endorse the title over to Alderson. Although Alderson allowed Lemons to drive the car to work, Petitioner's only interest in the vehicle was that Lemons would leave the keys in the vehicle at job sites in order for Petitioner to drive the vehicle. This was done by Lemons notwithstanding the fact that Petitioner's license to drive had been revoked.

Alderson testified she paid the insurance premiums on the vehicle. While Alderson considered contributions towards the insurance premiums by Lemons to be loans, Petitioner contributed nothing towards the insurance or loan payments on the vehicle. The vehicle was repossessed ten days after the victim was murdered.

Petitioner did not have his own key to the vehicle although Alderson and Lemons did leave a key in the vehicle. When the vehicle was seized, it was parked in Alderson's driveway and there was no showing it had been entrusted to Petitioner at that particular time.

The reasonableness of one's expectation of privacy is determined by such factors as the precautions he takes to maintain privacy, the way he uses a location, the history of the Fourth Amendment, the property interest involved and society's recognition of customary behavior. *Id.* 439 U.S. at 152-153. Notwithstanding his lack of ownership, Petitioner contributed

nothing towards maintaining the vehicle and either did not know or did not care that it could be repossessed at almost any time. The Petitioner took no precautions to maintain privacy in the vehicle. He apparently consented to the practice of leaving a key in the vehicle at all times even though he allegedly kept some tools in the vehicle. By driving around with a revoked driver's license, Petitioner knowingly operated the vehicle in violation of the law and was constantly inviting his arrest and the possible seizure of the vehicle incident to arrest. Petitioner's permission to drive Alderson's vehicle was obtained vicariously through Lemons. Permission to use the vehicle at work did not provide Petitioner with a continuous expectation of privacy in the vehicle during times when it was parked in Alderson's driveway and was under her immediate control. Quite simply, Petitioner's interest in the vehicle was not one society would recognize as attended by a reasonable expectation of privacy. Petitioner did not have a legally sufficient interest in the vehicle to claim the protection of the Fourth Amendment.

B. PETITIONER'S ALLEGATION THAT FALSE STATEMENTS KNOWINGLY AND INTENTIONALLY, OR WITH RECKLESS DISREGARD FOR THE TRUTH, WERE INCLUDED IN THE WARRANT AFFIDAVIT WAS INSUFFICIENT TO REQUIRE A HEARING ON THE ISSUE.

Relying on *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978), Petitioner contends the trial court should have conducted a hearing on his claim that false statements were included in the warrant affidavit. These alleged false

statements included: (1) that a confidential source had observed "a small, black four-door subcompact vehicle" parked about a block from the Winn residence the night of the murder; (2) that the two white males who got out of this vehicle "had a plastic container in their possession;" and (3) that the informant "gave descriptions of the two white males that are very favorable" of Petitioner and Lemons. Petitioner contends these statements were false because: (1) the informant, Baker, had described the vehicle she saw the white males get out of as a "black Ford Mustang"; (2) Baker told law enforcement officers the occupants of the vehicle "had a white gas can"; and (3) Baker described one of the occupants as being clean shaven and the other as sporting a moustache when, at the time of the murders, both suspects allegedly had facial hair.

The North Carolina Supreme Court correctly concluded defendant's allegations were insufficient to show that false statements were knowingly and intentionally, or with reckless disregard for the truth, included in the warrant affidavit. The three statements above are clearly distinguishable from the allegedly false information included in the affidavit in *Franks*. The Petitioner in *Franks* claimed that critical information establishing probable cause was falsely included in the warrant in his case. Although the affiant had stated this information came from interviews with named sources, Franks had substantial evidence to show the interviews never took place. By contrast, the North Carolina Supreme Court noted that the statements Petitioner attacks were all based on evidence actually received by the affiant and were not falsely or recklessly reported in the warrant affidavit. A black Ford Mustang is a black subcompact car. A plastic container can be a gas can and, notwithstanding the facial hair issue, the affiant could reasonably conclude Baker's description was favorable of the suspects.

In *Franks*, this Court noted that a sensible threshold showing was required to prevent the veracity challenge rule announced therein from resulting in new large-scale commitments of judicial resources to resolve *Franks* claims. To prevent misuse of veracity hearings, the Court held that a defendant was required to make a substantial preliminary showing that false or reckless statements were intentionally included in the warrant affidavit. Petitioner did not meet this burden and the decision below is correct.

CONCLUSION

Based on Petitioner's (1) lack of a reasonable expectation of privacy in the vehicle searched and (2) his failure to make a substantial preliminary showing that false information knowingly and intentionally, or with reckless disregard for the truth, was included in the warrant affidavit, the courts below correctly resolved Petitioner's Fourth Amendment claim and this PETITION should be denied.

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